

Decision

Filed: July 2, 2014

State of Louisiana
Civil Service Commission

Docket No. S-17840

Terry Wright

Versus

Department of Health and Hospitals, Eastern Louisiana Mental Health System

Rule(s): 12.2
Topic(s): Dismissal; physical abuse of patient

Appearances: Floyd J. Falcon, Jr. representing Mr. Wright
Jenna Young, representing DHH, ELMHS

Statement of the Appeal

Terry Wright was employed by the Department of Health and Hospitals (DHH), Eastern Louisiana Mental Health System (ELMHS), as a Corrections Guard/Therapeutic and he served with permanent status.

By letter dated December 9, 2013, DHH notified Mr. Wright that he was being dismissed effective December 12, 2013, for physically abusing Patient #3922¹ on October 29, 2012. In support of the severity of the penalty, DHH refers to improvement letters and disciplinary actions it previously gave to Mr. Wright.

On December 27, 2013, Mr. Wright appealed his dismissal. In his appeal, he denies the allegations of the dismissal letter. As relief, Mr. Wright requests reinstatement, back wages, interest and attorney's fees.

I held public hearings on February 24, 2014, in Jackson, Louisiana, and on March 28, 2014, in Baton Rouge, Louisiana. Based upon the evidence presented and pursuant to the provisions of Article X, § 12(A) of the Louisiana Constitution of 1974, as amended, I make the following findings and reach the following conclusions.

¹ The patients are referred to by their patient numbers in this decision to protect their confidentiality.

Preliminary Issue

At the hearing, DHH sought to introduce into evidence the written statements of Diana Armas, a witness who was subpoenaed but not present on either hearing date. Over the objection of Mr. Wright, I accepted the statements as a proffer only. I now accept them into evidence; however, even though the rules prohibiting the admission of hearsay are relaxed in administrative hearings, any hearsay evidence that is admitted must be corroborated by competent evidence in order to form the basis of a finding of fact. *Superior Bar & Grill, Inc. v. State of Louisiana, through the Department of Public Safety and Corrections*, 94-1879 (La. App. 1 Cir. 5/5/95), 655 So.2d 468; *Driscoll v Stucker*, 2004-0589 (La. 1/19/2005), 893 So.2d 32.

Findings of Fact

1. Terry Wright was employed by DHH at ELMHS as a Corrections Guard/Therapeutic and he served with permanent status. At the time of his dismissal, Mr. Wright had been employed by DHH for nine years.
2. ELMHS is an inpatient mental health hospital.
3. On October 29, 2012, Mr. Wright was assigned to the Administrative Special Security Area (ASSA) wing of the hospital, working the 6:00 a.m. to 6:00 p.m. shift on the A Team.
4. At approximately 7:15 a.m., Mr. Wright was alone in the day room when Patient #3691 approached him and asked to be transferred to an empty room.
5. Patient #3992 heard this request and approached Mr. Wright, who was sitting on the couch. Patient #3992 asked that he be transferred to the empty room instead of Patient #3691. Mr. Wright explained that he did not have the authority to make room transfers and that they would have to speak to the Lieutenant and the nurse.
6. Patient #3992 became verbally aggressive, hostile and loud about wanting the empty room. Mr. Wright attempted to redirect Patient #3992 and continued to inform him that this decision could only be made by the Lieutenant and the nurse, who were not present in the wing. Patient #3992 did not calm down. Instead, he lunged at Mr. Wright in a threatening manner. Mr. Wright pushed Patient #3992 away with an open hand on his shoulder as he got up from the couch. Patient #3992 stumbled, fell over a stool attached to a nearby table, and hit his head on the table.
7. At the time of this incident, Patient #3992 had been at ELMHS for approximately seven weeks. During that time, he had been in several physical altercations with other patients, and was in counseling and group therapy for his violent behavior.

8. Diana Armas, Corrections Guard/Therapeutic, was working in the hospital's control center. Mr. Wright got her attention and had her call for all available staff for assistance with Patient #3992.
9. Patient # 3992 was examined by the nursing staff and taken to the infirmary. His injuries from the incident included a scratch to the right side of his neck, a bruised and swollen ankle, a swollen right eye, and a cut near his right eyebrow that required stitches.
10. DHH Policy Number 0029-03, regarding Abuse and Neglect, defines physical abuse in pertinent part as, "Physical contact such as...pushing...the use of physical force which is unnecessary or excessive; and inappropriate or unauthorized use of restraint."

Discussion and Conclusions of Law

The right of a classified state employee to appeal disciplinary actions is provided for in Article X, § 8(A) of the Louisiana Constitution of 1974. That section provides that "[t]he burden of proof on appeal, as to the facts, shall be on the appointing authority." The appointing authority must prove its case by a preponderance of the evidence. A preponderance of evidence means evidence that is of greater weight or more convincing than that which is offered in opposition thereto. Proof is sufficient to constitute a preponderance when, taken as a whole, it shows the fact or causation sought to be proved as more probable than not." *Wopara v. State Employees' Group Benefits Program*, 2002-2641, (La. App. 1 Cir. 7/2/03), 859 So.2d 67.

DHH charges Mr. Wright with physically abusing Patient #3922 on October 29, 2012, by pushing him and causing him to hit the floor and injure himself.

To prove its charge at the hearing, DHH relied on the hearsay statements of Patient #3992, Ms. Armas, a doctor, a nurse, and a DHH investigator. However, none of these statements are corroborated by competent evidence, so under *Superior, & Driscoll, supra*, I cannot base any findings of fact upon them. I note that Ms. Armas' uncorroborated written statement indicates that Kenny Johnson, Corrections Guard/Therapeutic, was present during the incident, but DHH did not subpoena Mr. Johnson or call him as a witness. The only competent evidence in the record as to what happened to Patient #3992 is Mr. Wright's testimony and admissions.

Mr. Wright gave numerous statements and testified at the hearing. While his out-of-court statements and his testimony at the hearing are somewhat inconsistent, they are consistent as to the following: Patient #3992 was interested in the vacant room. He became verbally aggressive and hostile when Mr. Wright did not accede to his request, and lunged at Mr. Wright in a threatening manner. To defend himself, Mr. Wright pushed Patient #3992 away with his open hand, which caused Patient #3992 to stumble and injure himself. In light of the only competent evidence before me, i.e. Mr. Wright's version of events, I do not find that DHH has proved that he physically abused Patient

#3992 or that the force used by Mr. Wright to defend himself was unnecessary or excessive. DHH has thus failed to prove cause for discipline against Mr. Wright.

Based on the foregoing, I hereby grant Mr. Wright's appeal. The dismissal is reversed and all documents concerning it shall be removed from Mr. Wright's personnel file. I further order that DHH pay Mr. Wright back wages, subject to an offset in favor of DHH for all wages earned and/or unemployment compensation received, with legal interest on the difference.

As to the issue of attorney's fees, the Commission has ruled that attorney's fees are to be awarded when the action taken by the agency is unreasonable. *Appeal of Alexander*, CSC Docket No. S-8937. I find that DHH's dismissal of Mr. Wright was unreasonable; therefore, I award attorney's fees in the amount of \$1500.00 to Mr. Wright. The check for attorney's fees shall be made payable jointly to Mr. Wright and his counsel of record, Floyd J. Falcon, Jr.

Roxie F. Goynes
Civil Service Commission Referee